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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 787

THE OHIO NATIONAL LIFE INSURANCE COMPANY, A CORPORATION,
Petitioner,

vs.

MORRIS B. SACHS, T. C. WITT, GIZELLA WITT, JOHN PETER CHRISTENSEN, ANNA CHRISTENSEN, JOHN H. BUSCH, JR., PETER VISSER and WILLIAM STERNBERG,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

O. JOHN ROGGE,
Counsel for Petitioner.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

SUBJECT INDEX.

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	4
Specification of Errors To Be Urged	10
Reasons for Granting the Writ	11
The Prohibition of Section 9385 of the Ohio General Code	11
The Prohibition of Section 9357 of the Ohio General Code	16
The Prohibition of Sections 9351 and 9355 of the Ohio General Code	17

Table of Cases.

Awotin v. Atlas Exchange Bank, 295 U. S. 209....13, 15, 16
Barrett v. Reuter, 289 Ill. App. 221, 230, 7 N. E. (2d) 74 19
Bates v. Atlantic National Bank of Jacksonville, 101 F. (2d) 278 (C. C. A. 5th).....7, 12, 16
Binder v. Langhorst, 234 Ill. 583, 587, 85 N. E. 400.... 19
Board of Supervisors v. United States, 71 U. S. 435, 446 20
California Bank v. Kennedy, 167 U. S. 362.....7, 12, 15, 16
Calumet, etc. Dock Co. v. Conkling, 273 Ill. 318..... 8
City of Marion v. Sneeden, 291 U. S. 262..... 8
Concord First National Bank v. Hawkins, 174 U. S. 364 .....7, 12, 16
Continental National Bank v. Peoples Bank, 366 Ill. 366 .....8, 17, 18
Downing v. Downing, 24 Oh. N. P. N. S. 241, 254, 255.. 19
Erie Railroad Co. v. Tompkins, 304 U. S. 64.....15, 17
Federal Life Ins. Co. v. Barnett, 71 Ind. App. 613, 636, 125 N. E. 522, 529..... 18
Fidelity Union Trust Co. v. Field, 85 L. Ed. 176, 179.. 18
First Carolinas Joint Stock Land Bank v. Page, 206 N. C. 18, 123, 173 S. E. 312, 315..... 14
First National Bank v. Converse, 200 U. S. 425..... .....7, 12, 15, 16
First National Bank v. National Exchange Bank, 92 U. S. 122, 128 8
Gardner v. Johns, 64 Oh. App. 229.....8, 13
Golden v. Cervenka, 278 Ill. 409, 430, 116 N. E. 273.12, 16, 19
Goodall, et al. v. Cook, et al., 203 Ill. App. 69.....17, 18
Gress v. Ft. Laramie, 100 Oh. St. 35.....8, 14

Hackett v. Kripke, 62 Oh. App. 89 13
Hughes v. The People, 111 Ill. 457 19
Iowa Life Ins. Co. v. Eastern Mutual Life Ins. Co., 64 N. J. L. 340, 342, 45 Atl. 762, 763 18
Kimen v. Atlas Exchange Bank, 295 U. S. 215 .....13, 16
Knass v. Madison and Kedzie Bank, 354 Ill. 554...8, 13, 16
Lee v. Sturgis, 46 Oh. St. 153, 19 N. E. 560 19
Louisville & N. R. Co. v. U. S., 282 U. S. 740, 759; Note, 73 L. Ed. 339 19
McCann v. Retirement Board, 331 Ill. 193, 202, 162 N. E. 859 19
Merchants' National Bank v. Wehrmann, 202 U. S. 295 8
National Bank v. Matthews, 98 U. S. 621, 625 8
National Licorice Co. v. Labor Board, 309 U. S. 350, 356 15
New York Firemen Ins. Co. v. Ely, 2 Cow. (N. Y.) 678, 699 7
North River Ins. Co. v. Lawrence, 3 Wend. (N. Y.) 482, 483 7
Norwood Sash & Door Manufacturing Co. v. Logsdon, 65 Oh. App. 254 .....8, 13
People v. Chicago Gas Trust Co., 130 Ill. 268 8
People v. Russell, 245 Ill. 268, 278, 91 N. E. 1075 19
People v. Shedd, 241 Ill. 155, 167-8, 89 N. E. 332 19
People v. Wiersema State Bank, 361 Ill. 75 8
People v. Whittemore, 253 Ill. 378, 384, 97 N. E. 683.. 19
Reconstruction Finance Corporation v. Rawlings, 76 F. (2d) 566 (C. C. A. 5th) 7, 12, 16
Robotham v. Prudential Ins. Co., 64 N. J. Eq. 673, 53 Atl. 842 7
San Giorgio I v. Rheinstrom Co., 294 U. S. 494, 496..15, 16

Schofield v. Goodrich Bros. Banking Co., 98 Fed. 271 (C. C. A. 8th) 7, 12, 16

Shaw v. National German-American Bank, 199 U. S. 603, affirming 132 Fed. 658 (C. C. A. 8th) 7, 12, 16

State v. Board of Education, 95 Oh. St. 367, 373, 116 N. E. 516 19

State v. Brown, 121 Oh. St. 73, 166 N. E. 903, 904 19

State v. Mutual Life Ins. Co., 175 Ind. 59, 81, 93 N. E. 213 19

Texas & Pacific Ry. v. Pottorff, 291 U. S. 245 7

Ulmer v. Fulton, 129 Oh. St. 323 ..... 8, 13

U. S. v. Missouri Pac. R. R. Co., 278 U. S. 269, 280 19

West v. American Telephone and Telegraph Co., 85 L. Ed. 146 18

Yonkers v. Downey, 309 U. S. 590, petition for rehearing denied, 310 U. S. 656 8

STATUTES CITED.

Judicial Code, Section 24 (a) 2

Ohio General Code

Section 9351 ..... 3, 7, 11, 19

Section 9352 ..... 4, 7

Section 9353 ..... 4, 7, 9, 10, 11, 17, 18, 19

Section 9354 ..... 4, 8, 9, 10, 11, 17, 18, 19

Section 9355 ..... 5, 8, 9, 10, 11, 17, 18, 19

Section 9357 ..... 3, 7, 10, 16

Section 9385 ..... 3, 7, 10, 11, 12, 13, 14, 15

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Respondents.

PETITION FOR A WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, The Ohio National Life Insurance Company, an Ohio corporation, prays that a writ of certiorari issue to review a judgment of the United States Circuit Court of Appeals for the Seventh Circuit, reversing a judgment of the District Court of the United States for the Northern District of Illinois.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals (R. 107-118) is reported in 116 F. (2d) 113 and that of the District Court (R. 80-92) in 32 F. Supp. 152.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on November 28, 1940 (R. 118, 119). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the act of February 13, 1925. See also Rule 38 (5) (b) of this Court.

QUESTIONS PRESENTED.

1. Whether an Ohio life insurance company which is prohibited by statute from taking risks other than those connected with life insurance may nevertheless assume a super-added stockholder's liability, contingent in incidence and uncertain as to amount, attaching to the stock of an Illinois bank.

2. Whether an Ohio life insurance company which is prohibited by statute from acquiring bank stock may nevertheless assume a super-added stockholder's liability, contingent in incidence and uncertain as to amount, attaching to the stock of an Illinois bank.

3. If an Ohio life insurance company may assume such a liability, whether it can do so by a re-insurance agreement which was never authorized or approved as required by statute. Incidental questions are whether the statute is mandatory and whether it is subject to administrative construction.

STATUTES INVOLVED.

Various sections of the Ohio General Code, as amended by laws enacted in 1913 and 1925, are pertinent. Section 9357 provides, in part:

"A company organized under the laws of this state may invest its accumulations as follows:

1. In the United States, state, county, school, or city bonds, or farm loan bonds * * *.

2. In bonds and mortgages upon unincumbered real estate * * *, and in bonds and mortgages upon leasehold estates on real estate for ninety-nine years renewable forever * * *.

3. In loans upon the pledge of such bonds or mortgages * * *.

4. In loans upon its own policies * * *."

Section 9385, so far as pertinent, provides:

"No company, organized under the laws of this state, shall undertake any business or risk, except as herein provided, and no company, partnership or association, organized or incorporated by act of congress, or under the laws of this or any other state of the United States, or by any foreign government, transacting the business of life insurance in this state, shall be permitted or allowed to take any kind of risks, except those connected with, or appertaining to making insurance on life or against accidents to persons, or sickness, temporary or permanent physical disability, and granting, purchasing and disposing of annuities; * * *."

Section 9351 provides:

"No company organized under the laws of this State to do the business of life, accident or health insurance, either on stock, mutual, stipulated premium or assessment plan, shall consolidate with any other company, or reinsure its risks, or any part thereof with any other company, or assume or reinsure the whole of or any portion of the risks of any other company, except as hereinafter provided. Nothing herein contained shall prevent any such company from reinsuring a fractional part of any individual risk, not exceeding

four-fifths thereof, in a company duly authorized to transact business in this state, or with the permission of the superintendent of insurance, the whole of such risk; but no company, except as hereinafter provided, shall reinsure any part of any of its risks when the aggregate amount of its risks reinsured shall equal fifty per cent. of its total insurance in force."

Section 9352 provides:

"When any such company proposes to consolidate with any other company, or enter into any contract of reinsurance, it shall present its petition to the superintendent of insurance, setting forth the terms and conditions of the proposed consolidation or reinsurance, and praying for the approval or of any modification thereof, which the commission hereinafter provided for may approve."

Section 9353 provides:

"The superintendent thereupon shall issue an order of notice, requiring notice to be given by mail to the policy-holders of such company, of the pendency of such petition, and the time and place at which it will be heard, and the publication of the order of notice and petition, in five daily newspapers to be designated by him, at least one of which shall be published in the city of Columbus, for at least two weeks before the time appointed for the hearing on the petition."

Section 9354 provides:

"The governor or in the event of his inability to act, some competent person resident of the state to be appointed by him, the attorney general, and the superintendent of insurance, shall constitute a commission to hear and determine upon such petition. At the time and place fixed in such notice, or at such time and place as is fixed by adjournment, the commission shall proceed with the hearing and may make such examination into the affairs and condition of the company as it may deem proper. The superintendent of insurance may summon and compel the attendance and testimony of witnesses and the production of books and papers before the commission. Any policy-holder or stockholder of the above named company or companies may appear and be heard in reference to such petition."

Section 9355 provides:

> "If satisfied that the interests of the policy-holders of such company or companies are properly protected, and that no reasonable objection exists thereto, the commission may approve and authorize the proposed consolidation or reinsurance, or of such modification thereof as seems to it best for the interests of the policy-holders, and make such order with reference to the distribution and disposition of the surplus assets of any such company thereafter remaining, as shall be just and equitable. Such consolidation or reinsurance shall only be approved by the consent of all the members of the commission, whose duty it will be to guard the interests of the policy-holders of any such company or companies proposing to consolidate or reinsure."

STATEMENT.

On July 6, 1931, this suit was filed in the State Court of Illinois as a class suit in equity by creditors of The Roseland State Savings Bank, an Illinois bank, to enforce the super-added liability of its stockholders (R. 7-31, 67). On July 3, 1935, almost four years later, petitioner was joined as a defendant and thereafter removed the separable controversy as to it to the Federal Court (R. 2-6, 67). On January 29, 1940, more than eight and one-half years after the commencement of this suit, petitioner moved for summary judgment. This motion was granted by the District Court. The respondents appealed to the Circuit Court of Appeals for the Seventh Circuit and that Court reversed the judgment of the District Court.

Petitioner did not own, either of record or beneficially, any of the stock of The Roseland State Savings Bank on account of which liability is asserted against it herein (R. 109, 110, 67, 32-34). The American Old Line Insurance Company, an Illinois corporation (R. 107) was the owner of that stock (R. 3, 108). Petitioner was joined as a de-

fendant because it had agreed to reinsure the risks of the American Old Line Insurance Company (R. 3-6).

The re-insurance agreement between American Old Line Insurance Company and petitioner was entered into on November 19, 1930 (R. 34). Pursuant to that agreement petitioner, on January 8, 1931, assumed the risks of the American Old Line Insurance Company and took over its assets with the exception of four items totaling $607,030 (R. 109, 32). These four items were corporate stocks valued at $382,030, real estate valued at $50,000, a collateral note in the face amount of $25,000, and government bonds in the face amount of $150,000; and, according to the re-insurance agreement, constituted part payment of the purchase price of $1,388,750 to be paid by petitioner (R. 109, 110, 32, 33). Included in the first item was the stock in question of The Roseland State Savings Bank (R. 110). The difference between the $607,030 in assets retained and the stated purchase price of $1,388,750, amounting to $781,720, petitioner paid to American Old Line Insurance Company in cash (R. 110).

By the re-insurance agreement petitioner assumed and agreed to discharge all of the "contracts * * * and liabilities" of the American Old Line Insurance Company (R. 32), and the latter guaranteed and warranted "the genuineness and accuracy of its records and books of account as of October 31, 1930, in reliance upon which this agreement is made" (R. 33).

The stock in question of the bank carried a possible liability of $139,800 (R. 110). The bank, however, did not cease to do business until July 6, 1931 (R. 9), the day this suit was filed. Until that date, more than eight months after October 31, 1930, specified in the re-insurance agreement, and almost six months after petitioner in fact took over the risks of the American Old Line Insurance Com-

pany, the liability of $139,800 remained contingent in incidence and uncertain as to amount.

Section 9357 of the Ohio General Code, as amended by laws enacted in 1913 and 1925 prohibited petitioner from acquiring stocks of any kind, let alone bank stock carrying a super-added liability[1] (See R. 116). Section 9385 prohibited petitioner from taking any kind of risks except those connected with life or related insurance (See R. 116).

Section 9351 *expressly* prohibited petitioner from reinsuring all the risks of another company except as provided in subsequent sections. Section 9352 required petitioner to file with the Superintendent of Insurance of the State of Ohio a petition setting forth the terms and conditions of the proposed re-insurance agreement and praying for its approval. Section 9353 required the Superintendent of Insurance to give notice by mail of the pendency of the petition to the policy holders of petitioner, and to publish the notice and petition to five daily newspapers to be designated by him. Section 9354 provided for a

1. Since Section 9357 enumerates the investments which petitioner may make, a prohibition is implied against making any other investments. *Robotham* v. *Prudential Ins. Co.*, 64 N. J. Eq. 673, 53 Atl. 842; *North River Ins. Co.* v. *Lawrence*, 3 Wend. (N. Y.) 482, 483; *New York Firemen Ins. Co.* v. *Ely*, 2 Cow. (N. Y.) 678, 699. Compare *First National Bank* v. *Converse*, 200 U. S. 425 (implied prohibition against acquisition of stock by a national bank); *Concord First National Bank* v. *Hawkins*, 174 U. S. 364 (*id.*); *California Bank* v. *Kennedy*, 167 U. S. 362 (*id.*); *Shaw* v. *National German-American Bank*, 199 U. S. 603, affirming 132 Fed. 658 (C. C. A. 8th); (*id.*); *Bates* v. *Atlantic National Bank of Jacksonville*, 101 F. (2d) 278 (C. C. A. 5th) (*id.*); *Reconstruction Finance Corporation* v. *Rawlings*, 76 F. (2d) 566 (C. C. A. 5th) implied prohibition against acquisition of stock by a state bank; *Schofield* v. *Goodrich Bros. Banking Co.*, 98 Fed. 271 (C. C. A. 8th) (*id.*); compare further *Texas & Pacific Ry.* v. *Pottorff*, 291 U. S. 245 (p. 253 "National banks lack power to pledge their assets to secure a private deposit. The measure of

commission of three, to be composed of the Governor of the State or, in the event of his inability to act, some competent person resident in the State to be appointed by him, the Attorney General and the Superintendent of Insurance. Section 9354 further provided that this commission should hold a hearing, at which hearing any policy holder of petitioner could appear and be heard with reference to the petition. Section 9355 provided that the commission, if satisfied that the interests of the policy holders of petitioner are properly protected, "may approve and authorize the proposed * * * reinsurance." The last sentence of this section provided: "Such consolidation or reinsurance *shall only* be approved by the consent of *all* the members of the commission, whose duty it will be to guard the interests of the policy holders of any such company or companies proposing to consolidate or reinsure." (Italics supplied.)

Petitioner filed its petition with the Superintendent of Insurance of the State of Ohio praying for approval of the proposed re-insurance agreement (R. 110). The Super-

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their powers is the statutory grant; and powers not conferred by Congress are denied."); *City of Marion* v. *Sneeden*, 291 U. S. 262 (*id.*); *Yonkers* v. *Downey*, 309 U. S. 590, petition for rehearing denied, 310 U. S. 656 (*id.*); *Merchants' National Bank* v. *Wehrmann*, 202 U. S. 295; *Continental National Bank* v. *Peoples Bank*, 366 Ill. 366 (p. 375 "If a power claimed is withheld, the withholding is to be regarded as a prohibition against its exercise."); *People* v. *Wiersema State Bank*, 361 Ill. 75 (implied prohibition against a pledge of assets by a state bank to secure deposits); *Knass* v. *Madison and Kedzie Bank*, 354 Ill. 554 (implied prohibition against agreement by a state bank to repurchase real estate mortgage bonds sold by it); *Calumet, etc. Dock Co.* v. *Conkling*, 273 Ill. 318; *People* v. *Chicago Gas Trust Co.*, 130 Ill. 268. See also *National Bank* v. *Matthews*, 98 U. S. 621, 625; *First National Bank* v. *National Exchange Bank*, 92 U. S. 122, 128; *Ulmer* v. *Fulton*, 129 Oh. St. 323; *Gress* v. *Ft. Laramie*, 100 Oh. St. 35; *Norwood Sash & Door Manufacturing Co.* v. *Logsdon*, 65 Oh. App. 254; *Gardner* v. *Johns*, 64 Oh. App. 229.

intendent of Insurance, however, contrary to Section 9353, gave no notice (R. 110, 111, 75, 76). The commission, contrary to Section 9354, did not meet (R. 111, 75, 76), nor did the commission approve or authorize the re-insurance agreement as required by Section 9355 (R. 75, 76). Policy holders of petitioners were not afforded the quasi judicial protection of notice, hearing and adjudication. The Superintendent of Insurance assumed to approve the re-insurance agreement without notice, without a convening of the commission, without a hearing and without approval by all the members of the commission, contrary to the express provisions of Sections 9353, 9354 and 9355.

The record contains only five other specific instances in which the Ohio insurance authorities failed to comply with the provisions of these sections (R. 77, 78). No showing was made of any uniform or long continued non-observance of these statutory provisions (See R. 56, 57). On the contrary, when petitioner, shortly after the re-insurance agreement here involved, re-insured the risks of the Omaha Life of Omaha, Nebraska, the Ohio insurance authorities strictly complied with these provisions and the commission provided for in Section 9354 approved and authorized that re-insurance agreement as required by Section 9355 (R. 57).

Petitioner contends (1) that it did not agree to pay or assume the payment of the super-added stockholder's liability attaching to the shares of stock of The Roseland State Savings Bank which were owned by the American Old Line Insurance Company and were retained by it; (2) that it had no power to assume any such liability, contingent in incidence and uncertain as to amount, because petitioner was prohibited by statute from taking any risks unrelated to life insurance and was forbidden to acquire bank stock; and (3) that even if petitioner attempted to do so, it was without power to assume any such liability by an agreement which was not approved or authorized

as required by statute. The Circuit Court of Appeals left open the first contention (R. 116, 118), because it was not raised in petitioner's motion for a summary judgment (R. 112) and was not disposed of by the District Court (R. 118), and overruled the other two.

In overruling petitioner's second contention, the Circuit Court of Appeals assimilated an agreement to pay a liability contingent in incidence and uncertain as to amount to an agreement to pay a liability certain in amount and definitely accruing (R. 117). In overruling petitioner's third contention, the Circuit Court of Appeals reached the conclusion that Sections 9353, 9354 and 9355 were rendered ambiguous by the provision in Section 9351 excepting from the procedure prescribed by those sections a re-insurance of a fractional part of a single risk (R. 114, 115), and then resorted to the doctrine of administrative construction of a statute (R. 115, 116).

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals for the Seventh Circuit erred:

1. In holding that petitioner had power to assume a super-added stockholder's liability contingent in incidence and uncertain as to amount, contrary to the provisions of Section 9385 prohibiting petitioner from taking any kind of risks unrelated to life insurance.

2. In holding that petitioner had power to assume a super-added stockholder's liability contingent in incidence and uncertain as to amount, contrary to the provisions of Section 9357 prohibiting petitioner from acquiring stock.

3. In holding that petitioner had power to assume a super-added stockholder's liability contingent in incidence and uncertain as to amount by a re-insurance agreement which was never authorized and approved as required by Section 9355.

4. In holding that Sections 9353, 9354 and 9355 were rendered ambiguous by Section 9351 and that administrative construction was applicable and controlling.

5. In holding that Sections 9353, 9354 and 9355 were not mandatory.

6. In failing to follow local statutes and applicable local decisions.

7. In failing to follow principles established by decisions of this Court.

8. In reversing the judgment of the District Court.

REASONS FOR GRANTING THE WRIT.

(1) The Circuit Court of Appeals, in holding that petitioner had power to assume a super-added stockholder's liability, contingent in incidence and uncertain as to amount, decided an important question of law in a way in conflict with the provisions of Section 9385, in conflict with applicable local decisions and in conflict with principles established by decisions of this Court.

To protect the investments of millions of policy holders of insurance companies, many states have enacted statutes similar to the Ohio statutes here involved. Such statutes closely limit the investments and assumptions of risks which insurance companies may make and carefully specify the steps to be taken in effecting re-insurance, in order to prevent assumptions of risks which would tend to jeopardize the investments of policy holders.

The Ohio statutes sought to protect policy holders from the dangers inherent in assumptions of vicarious liabilities by prohibiting life insurance companies from owning corporate stock or assuming any risk not pertaining to life insurance, and from dangers inherent in wholesale re-insurance by requiring notice, hearing, adjudication, ap-

proval and authorization by a quasi judicial commission composed of three responsible state officials.

Section 9385 specifically prohibited petitioner from taking any kind of risks except those connected with life or related insurance. The provisions of this section included the super-added stockholder's liability involved in this case, for that liability at the time of the reinsurance agreement was contingent in incidence and uncertain as to amount. It was precisely the kind of contingent, uncertain, unknown risk against which the Ohio statutes sought to protect the investments of policy holders of insurance companies.

Just as the depositors and stockholders of banks—and even the stockholders of ordinary commercial corporations —are protected against super-added stockholder's liability if the courts find either an implied or an express prohibition against the acquisition of stock, *First National Bank* v. *Converse*, 200 U. S. 425 (national bank protected against stockholder's liability as a result of an implied prohibition against acquisition of stock), *Concord First National Bank* v. *Hawkins*, 174 U. S. 364 (*id.*), *California Bank* v. *Kennedy*, 167 U. S. 362 (*id.*), *Shaw* v. *National German-American Bank*, 199 U. S. 603, affirming 132 Fed. 658 (C. C. A. 8th) (*id.*), *Bates* v. *Atlantic National Bank of Jacksonville*, 101 F. (2d) 278 (C. C. A. 5th) (*id.*), *Reconstruction Finance Corporation* v. *Rawlings*, 76 F. (2d) 566 (C. C. A. 5th) (state bank protected against stockholder's liability as a result of an implied prohibition against acquisition of stock), *Schofield* v. *Goodrich Bros. Banking Co.*, 98 Fed. 271 (C. C. A. 8th) (*id.*) *Golden* v. *Cervenka*, 278 Ill. 409 (commercial corporation protected against stockholder's liability because of a prohibition against acquisition of stock), so should the policy holders of insurance companies be protected against contingent, uncertain risks of unknown quantum. The same principle which protects the depositors and stockholders of banks by striking down

agreements on the part of such institutions to repurchase bonds sold by them, *Awotin* v. *Atlas Exchange Bank*, 295 U. S. 209 (national bank), *Kimen* v. *Atlas Exchange Bank*, 295 U. S. 215 (*id.*) *Knass* v. *Madison & Kedzie Bank*, 354 Ill. 554 (state bank)[2], should protect the policy holders of insurance companies against contingent hazards outside of the business of insurance.

Specifically, policy holders of petitioner, because of the prohibition in Section 9385 against the assumption of risks unrelated to the business of insurance, should be protected against the stockholder's liability asserted in this case—a liability which, at the time of the alleged assumption, was as contingent in incidence and as uncertain in amount as any risk could be.

In the *Awotin* case, this Court, speaking through Mr. Justice Stone, said, at p. 214:

> "* * * National banks are public institutions and the purpose and effect of the statute is to protect their depositors and stockholders and the public from the hazards of contingent liabilities, attendant upon the assumption by the bank of the risk of loss by its customers, resulting from the permitted dealing in securities by the bank. The prohibition would be nullified and the evil sought to be avoided would persist, if, notwithstanding the illegality of the contract to repurchase, the buyer, upon tender of the bonds, could recover all that he had paid for them. Such a construction of the statute is inadmissible."

It is likewise true that insurance companies are public institutions, that the purpose of the Ohio statutes was to protect policy holders, stockholders and the public from the hazards of contingent liabilities, and that the prohibition against assuming unauthorized risks would be nulli-

2. See also *Ulmer* v. *Fulton*, 129 Oh. St. 323; *Gress* v. *Laramie*, 100 Oh. St. 35; *Norwood Sash & Door Manufacturing Co.* v. *Logsdon*, 65 Oh. App. 254; *Gardner* v. *Johns*, 64 Oh. App. 229. But compare *Hackett* v. *Kripke*, 62 Oh. App. 89.

fied if the stockholder's liability alleged in this case could be enforced against petitioner.

To sustain the prohibition contained in Section 9385 against risks unrelated to insurance and to give effect to the policy behind that section of protecting the investments of policy holders by preventing the funds of insurance companies from being subjected to unusual and abnormal risks, works no hardship upon the respondents herein. They were not parties to the reinsurance agreement and gave no part of the consideration therefor. They placed no reliance upon the agreement and were not misled by it. They have no equity superior to the rights of persons whom the statutes of Ohio sought to protect. At best, their claim is only a bit of "legal grace" which they "fortuitously discovered" and for which they gave nothing. *First Carolinas Joint Stock Land Bank* v. *Page*, 206 N. C. 18, 123; 173 S. E. 312, 315.

As a matter of fact, petitioner never assumed the stockholder's liability asserted against it herein. At the time of the reinsurance agreement, November 19, 1930 (R. 34), and at the time petitioner took over the risks of the American Old Line Insurance Company, January 8, 1931 (R. 109), The Roseland State Savings Bank was an open going concern and remained so until July 6, 1931 (R. 9). In November 1930, when the agreement was made, and in January 1931, when it was consummated, no one had any thought of stockholder's liability. Petitioner took over the liabilities of American Old Line Insurance Company as shown on its books and American Old Line Insurance Company warranted the genuineness and accuracy of its books (R. 33), and that was that.

That the parties did not intend petitioner to assume the liability herein asserted is evident from the fact that no attempt was made to transfer the bank stock to petitioner. The contract expressly provided that all stock should remain with the American Old Line Insurance Company,

together with other property which, with the bank stock, had a face value of $607,030 (R. 110, 32). In addition, petitioner paid American Old Line Insurance Company cash in the amount of $781,720 (R. 110). But even if petitioner had attempted to assume the liability asserted against it, the Circuit Court of Appeals, in accordance with the provisions of, and policy behind, Section 9385, in accordance with applicable local decisions and in accordance with principles established by decisions of this Court, should have held petitioner without power to assume any such contingent, uncertain and unknown liability wholly unrelated to the insurance business.

The Circuit Court of Appeals, however, assimilated this contingent and uncertain liability of unknown quantum to the assumption of a liability certain in amount and definitely accruing (R. 117), thus depriving the policy holders of petitioner of the very protection which Section 9385 was intended to give them. In so doing, the Circuit Court of Appeals decided an important question of law in a way in conflict with the provisions of Section 9385, contrary to the requirement of Section 34 of the Judiciary Act of 1789 and in conflict with applicable local decisions, contrary to the decision of this Court in *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64.

The Circuit Court of Appeals also failed to follow the principles established by such decisions of this Court as *First National Bank* v. *Converse, supra, California Bank* v. *Kennedy, supra,* and *Awotin* v. *Atlas Exchange Bank, supra.* This is an additional ground for granting the writ herein. *San Giorgio I* v. *Rheinstrom Co.*, 294 U. S. 494, 496. See also *National Licorice Co.* v. *Labor Board*, 309 U. S. 350, 356.

(2) The Circuit Court of Appeals, in holding that petitioner had power to assume a super-added stockholder's liability, contingent in incidence and uncertain as to amount, decided an important question of law in a way in conflict with the provisions of Section 9357, in conflict with applicable local decisions and in conflict with principles established by decisions of this Court.

As an additional protection to the investments of policy holders of Ohio insurance companies, Section 9357 in effect prohibited Ohio insurance companies from investing in stocks of any kind, let alone bank stocks carrying a super-added liability. In order to give effect to the prohibition contained in this section and to carry out the policy behind it, the Circuit Court of Appeals should have held that petitioner was without power to assume a hazardous, uncertain and contingent liability. *First National Bank* v. *Converse, supra; Concord First National Bank* v. *Hawkins, supra; California Bank* v. *Kennedy, supra; Shaw* v. *National German-American Bank, supra; Bates* v. *Atlantic National Bank of Jacksonville, supra; Reconstruction Finance Corporation* v. *Rawlings, supra; Schofield* v. *Goodrich Bros. Banking Co., supra; Golden* v. *Cervenka, supra.* Compare *Awotin* v. *Atlas Exchange Bank, supra; Kimen* v. *Atlas Exchange Bank, supra; Knass* v. *Madison & Kedzie Bank, supra.* In reaching an opposite conclusion the Circuit Court of Appeals decided an important question of law in conflict with the prohibition contained in Section 9357 contrary to the requirement of Section 34 of the Judiciary Act of 1789, failed to apply applicable local decisions as required by the decision of this Court in *Erie Railroad Co.* v. *Tompkins, supra,* and failed to follow principles established by decisions of this Court as required by *San Giorgio I* v. *Rheinstrom Co., supra.*

(3) The Circuit Court of Appeals, in deciding that petitioner had power to assume a super-added stockholder's liability, contingent in incidence and uncertain as to amount, by a re-insurance agreement which was never approved or authorized as required by Sections 9353, 9354 and 9355, decided an important question of local law in a way in conflict with the provisions of these sections and in conflict with applicable local decisions.

For the further protection of the investments of policy holders of Ohio insurance companies, Ohio law expressly required notice and a hearing, adjudication and approval by a full commission of three responsible state officials before an Ohio life insurance company could re-insure all the risks of another company. Section 9353 provided for notice to policy holders; Section 9354 provided for a commission of three responsible state officials to pass on applications for re-insurance and for a hearing at which policy holders or stockholders might appear and be heard; and Section 9355 provided for approval and authorization by the commission. Section 9355 leaves no doubt but that these statutory provisions are mandatory and that they were intended to protect policy holders. This section specifically requires that "re-insurance *shall only* be approved by the consent of *all* members of the commission, whose duty it will be to guard the interests of the policy holders." (Italics supplied.)

These statutory provisions were ignored in the case of the re-insurance agreement here involved (R. 75, 76). Accordingly, the Circuit Court of Appeals should have held that petitioner was without power to assume a hazardous, uncertain, stockholder's liability by such an agreement. Compare *Continental National Bank* v. *Peoples Bank*, 366 Ill. 366; *Goodall, et al.* v. *Cook, et al.*, 203 Ill. App. 69.

In *Continental National Bank* v. *Peoples Bank*, one bank

assumed the deposits of another and upon the insolvency of the latter sought to enforce the super-added liability of its stockholders. The court held that the alleged assumption agreement was void and that no recovery could be had thereon because it had not been approved by the Auditor of Public Accounts as required by statute.

In the *Goodall* case, the court held that an insurance company and its officers had no power to execute a reinsurance agreement without the approval of its stockholders as prescribed by statute. The court said, at p. 74:

> "We are therefore of the opinion that appellees, as officers and directors of the Bankers Accident Insurance Company, had no power or authority to transfer the risks covered by this association or to effect a reinsurance of the members of said association in any other organization. Such transfer could only be effected in the manner provided by statute, and the efforts of appellees to effect such transfer without submitting the same to a vote of the members of said association would be ineffectual. * * *"

To the same effect are *Iowa Life Ins. Co.* v. *Eastern Mutual Life Ins. Co.*, 64 N. J. L. 340, 342, 45 Atl. 762, 763; *Federal Life Ins. Co.* v. *Barnett*, 71 Ind. App. 613, 636, 125 N. E. 522, 529.

The Circuit Court of Appeals did not discuss or distinguish these cases. It cited no contrary decisions, and diligent search has disclosed none. Indeed, the Circuit Court of Appeals indicated upon oral argument that it considered itself *not* bound to follow the case of *Continental National Bank* v. *Peoples Bank*. It is submitted that the Court was bound to follow this decision (*Fidelity Union Trust Co.* v. *Field*, 85 L. Ed. 176, 179), and the decision in the *Goodall* case, which would have been controlling in the State Court. *West* v. *American Telephone and Telegraph Co.*, 85 L. Ed. 146.

The Circuit Court of Appeals felt that the plain provisions of Sections 9353, 9354 and 9355 were rendered doubt-

ful by the provisions of Section 9351 (R. 114, 115). But these sections are not ambiguous, whether taken singly or together. Sections 9353, 9354 and 9355 provide a procedure to be followed when it is proposed to re-insure *all* of the risks of another company as is the case here. Section 9351 excepts from this procedure a re-insurance of a fractional part of a single risk.

Since these statutory provisions are unambiguous, the doctrine of administration construction has no application. *People* v. *Shedd*, 241 Ill. 155, 167-8, 89 N. E. 332; *Lee* v. *Sturgis*, 46 Oh. St. 153, 19 N. E. 560; *U. S.* v. *Mo. Pac. R. Co.*, 278 U. S. 269, 277, 280; *Louisville & N. R. Co.* v. *U. S.*, 282 U. S. 740, 759; NOTE, 73 L. Ed. 339.

Even were this not true, the inaction of the Ohio Commission furnished no guide to construction since its practice was not uniform (*McCann* v. *Retirement Board*, 331 Ill. 193, 202, 162 N. E. 859; *U. S.* v. *Missouri Pac. R. R. Co.*, 278 U. S. 269, 280), and was not long continued. *Barrett* v. *Reuter*, 289 Ill. App. 221, 230, 7 N. E. (2d) 74; *State* v. *Brown*, 121 Oh. St. 73, 166 N. E. 903, 904; *Louisville & N. R. Co.* v. *U. S.*, 282 U. S. 740, 759.

Moreover, the failure of the Commission to act in some cases cannot nullify or change the clear requirements of the statute. *People* v. *Whittemore*, 253 Ill. 378, 384, 97 N. E. 683; *People* v. *Russell*, 245 Ill. 268, 278, 91 N. E. 1075; *Louisville & N. R. Co.* v. *U. S.*, 282 U. S. 740, 759. Administration officials have no power to waive express provisions for regulatory action. *Golden* v. *Cervenka*, 278 Ill. 409, 430, 116 N. E. 273; *State* v. *Mutual Life Ins. Co.*, 175 Ind. 59, 81, 93 N. E. 213.

Sections 9351, 9353, 9354 and 9355 are not only unambiguous; they are mandatory. Compare *State* v. *Board of Education*, 95 Oh. St. 367, 373, 116 N. E. 516; *Downing* v. *Downing*, 24 Oh. N. P. N. S. 241, 254, 255; *Binder* v. *Langhorst*, 234 Ill. 583, 587, 85 N. E. 400; *Hughes* v. *The*

People, 111 Ill. 457; *Board of Supervisors* v. *United States,* 71 U. S. 435, 446.

In the *Hughes* case the court held that a statute requiring court approval of investments by guardians was mandatory, saying, at p. 461:

> "The legislature, in adopting our statute requiring the approval of the county court to loans made by guardians on real estate security, was evidently intending to give additional protection to the estates of infants, and this intention on the part of the legislature can only be given effect by holding * * * that the act is mandatory. To hold otherwise would leave the law practically as it was before. The guardian, under such construction, might obtain the approval of the county court of such loans, or not, just as he saw fit, which would make the statute practically a dead letter."

That decision is applicable here. The Ohio statute was designed to protect policy holders from improvident re-insurance. The prescribed approval by a full commission reflects legislative intent to insist upon that protection. The decision of the Circuit Court of Appeals completely defeats this intent.

It is respectfully submitted that this case calls for the exercise of the supervisory powers of this court in order that the important question of the effect of regulatory insurance and re-insurance statutes designed to protect policy investors may be settled in the federal courts in conformity with uniform state decisions. This can be accomplished only by awarding a Writ of Certiorari herein and reversing the decision of the Circuit Court of Appeals.

THE OHIO NATIONAL LIFE INSURANCE COMPANY,
Petitioner,

By O. JOHN ROGGE,
Counsel for Petitioner.

FILED
MAR 24 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 787

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vs.

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Respondents.

REPLY BRIEF OF PETITIONER.

O. JOHN ROGGE,
Counsel for Petitioner.

THE GUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

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Respondents.

REPLY BRIEF OF PETITIONER.

MAY IT PLEASE THE COURT:

Two misstatements of fact in respondents' brief require correction.

On page 3 it is charged that "if the reinsurance agreement is to be stricken down here, it must be stricken down in its entirety and the many policyholders of the American Old Line are left without insurance". All authorities recognize the power of a court to refuse to enforce an illegal provision in a contract without affecting the enforcibility of the lawful provisions therein. In the present

case, in which the unlawful assumption of stockholders liability cannot be enforced, it does not follow that the insurance provisions should not be enforced.

Nor does the record support respondents' assertion that "the many policyholders of the American Old Line are left without insurance". Respondents' admission (p. 3) "that after the approval of the contract by the Ohio Superintendent of Insurance alone, it (petitioner) carried out the contract" is a frank recognition by respondents that the Ohio National Life Insurance Company has fully performed its *reinsurance* commitments to policyholders. This was done by the execution of separate and individual contracts of insurance, which are not affected by the invalidity of the old agreement.

On page 13 respondents assert, without any support in the record, that "appellee apparently reduced its payment to the American Old Line by the sum of $139,800 because of the liability of the American Old Line on account of its bank stockholdings". This deduction is wholly untrue and is tacitly so recognized by respondents' use of the word "apparently" to qualify the erroneous statement.

On pages 4 and 5 respondents object to petitioner's characterization of the bank stockholders liability as "contingent in incidence and uncertain as to amount" when the Re-Insurance Agreement was entered into. Suffice it to say that the Circuit Court of Appeals, whom respondents assert is "well acquainted with the nature of bank stockholders liability under the Illinois Constitution" twice used the term "contingent" in describing this liability (R. 108, 110). The Circuit Court of Appeals also stated that the liability of the American Old Line "was fixed" on June 13, 1934, (four years after the reinsurance agreement was consummated) and that with respect to said Re-Insurance Agreement, the stockholders liability "subsequently accrued" (R. 110, 111). Petitioner there-

fore submits that its characterization of this liability as *contingent in incidence and uncertain as to amount* when the Re-Insurance Agreement was entered into, conforms strictly to the opinion of this liability by the Circuit Court of Appeals.

There are two short answers to respondents' lengthy argument on *ultra vires*. First, the defense of *ultra vires* is not abolished in Ohio as to insurance companies, banks, and other corporations not organized under the General Corporation Act. *U. F. Oratinese* v. *Picciano*, 129 Oh. St. 466, 196 N. E. 155; *Ulmer* v. *Fulton, Supt.*, 129 Oh. St. 323, 340-342, 195 N. E. 557. Second, special corporations such as banks, building and loan associations, and insurance companies can raise the defense of *ultra vires* even though the contract is completely executed. *Ulmer* v. *Fulton, Supt.*, 129 Oh. St. 323, 342, 195 N. E. 557; *Gardner* v. *Johns*, 64 Oh. App. 229, 18 Oh. Op. 80. Both of these propositions are supported by statutes and judicial decisions of Ohio, contrary to the contentions of respondents.

Petitioner fully paid for all it received from the American Old Line Insurance Company. It paid $781,720 in cash (R. 110). Respondents were not injured thereby. They contributed nothing to this payment. They lost nothing thereby, as they have their remedy against the $781,720—even if it is in the hands of stockholders of the American Old Line. *Singer* v. *Hutchinson*, 183 Ill. 606, 619; *Gaskins* v. *Bonfils*, 79 F. (2d) 352, 355.

CONCLUSION.

It is respectfully submitted that petitioner's alleged assumption of stockholders liability, contingent in incidence and uncertain as to amount, by an unauthorized and unapproved reinsurance agreement is void, and that the decision of the Circuit Court of Appeals imposes an unjust burden upon petitioner, presents an unmerited windfall to respondents, and is contrary to all applicable statutes and decisions.

Respectfully submitted,

O. JOHN ROGGE,
Counsel for Petitioner.

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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CHAMPLIN-SHEALY COMPANY, CHICAGO 265

SUBJECT INDEX.

PAGE

Jurisdiction—The case at bar does not present a final judgment 2

Statutes Involved 2

Statement—Corrections 3

Brief

I. Bank Stockholders' liability in Illinois is neither "contingent in incidence" nor "uncertain as to amount"..... 4

II. The claim of respondents is neither "a bit of 'legal grace'" nor one "fortuitously discovered" 6

III. The fact that the re-insurance agreement between the American Old Line Life Insurance Company, and Petitioner was approved by the Superintendent of Insurance of Ohio alone, and not by the Commission provided for by the Statute, does not render the re-insurance agreement void, since the said provisions of the Ohio statutes are directory merely, and not mandatory 7

IV. Ultra vires 8

Conclusion 14

Table of Cases.

PAGE

American Const. Co. v. Jacksonville Rwy., 148 U. S. 372, 378, 384 2
Awotin v. Atlas Exchange Bank, 295 U. S. 14
Bruce v. Tobin, 248 U. S. 18 2
Burnet v. West Madison State Bank, 375 Ill. 402, 406 *et seq.* 5
Chicago & N. W. Ry. Co. v. Osborne, 146 U. S. 354.... 2
Comstock v. Morgan Park Bank, 367 Ill. 276..... 5
The Conqueror, 166 U. S. 110, 113 2
Erie Railroad v. Tomkins, 304 U. S. 64 .....7, 10
Gardner v. Johns, 64 Ohio App. 229 14
Golden v. Cervenka, 278 Ill. 409..... 5
Gress v. Fort Laramie, 100 Oh. St. 35 13
Hackett v. Kupke, 62 Oh. App. 89..... 14
Hamilton Shoe Co. v. Wolf Brothers, 240 U. S. 251, 258 2
Hays v. Galion Gas Light & Coal Co. (1876), 29 Oh. St. 330, 340 12
Heine v. Degan, 362 Ill. 357, 366 *et seq.* 5
Kelly v. Central Union Fire Insurance Company (1917), 101 Kans. 91, 165 Pac. 806..... 11
Larwell v. Hanover Savings Deposit Society (1883), 40 Oh. St. 274, 283, 284..... 12
London & Lancashire Indemnity Co. v. Fairbanks Steam Shovel Co., 112 Oh. St. 136, 147 N. E. 329 (1925) 10
Norwood Sash & Door Mfg. Co. v. Logsdon, 65 Oh. App. 254 13
Panama R. R. v. Napier Shipping Co., 166 U. S. 280, 284 2
Sanders v. Merchants State Bank, 349 Ill. 547..... 5
Ulmer v. Fulton, 129 Oh. St. 323 13
Western & Southern Fire Ins. Co. v. Murphy (1916), 56 Okla. 702, 156 Pac. 885 11

Statutes Cited.

PAGE

Ohio General Code
Section 9351 9
Section 9354 4
Section 9358 ..... 2, 3, 4, 12

Smith-Hurd, Illinois Revised Statutes, 1929, Chapter 73, Section 504 ..... 6, 13

Constitution of Illinois of 1870, Article XI, Section 7.. 5, 7

Treatises.

Fletcher, Ency. Corporations, Perm. Ed.
Volume 7, Section 3402 9
Section 3468 *et seq.* 9

Ohio Jurisprudence
Volume 10, Section 614 10
Section 615 10
Section 622 9

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Respondents,

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Before considering the matters presented in the Petition for *Certiorari* the question of the jurisdiction of the Court in view of the status of the case should be presented:

JURISDICTION.

While the Supreme Court may, it will not ordinarily take jurisdiction of a cause by *certiorari* before a judgment is entered finally disposing of a case in the lower courts.

American Const. Co. v. *Jacksonville Rwy.*, 148 U. S. 372, 378, 384.

The Conqueror, 166 U. S. 110, 113.

Panama R. R. v. *Napier Shipping Co.*, 166 U. S. 280, 284.

Hamilton Shoe Co. v. *Wolf Brothers*, 240 U. S. 251, 258.

Chicago & N. W. Ry. Co. v. *Osborne*, 146 U. S. 354.

Bruce v. *Tobin*, 248 U. S. 18.

Attention is called to the order of the Circuit Court of Appeals reversing and *remanding* this case (R. 119) to the trial court, where on the motion for summary judgment, a *single* issue was presented—namely the question of the propriety of the manner of the approval of the reinsurance agreement by the Superintendent of Insurance of Ohio (R. 58-60, 111-112). The Circuit Court of Appeals went to great pains to point out and leave open an important question for consideration of the trial court on the retrial of the case (R. 116, 118).

This Court should not be called upon to dispose of cases piecemeal.

STATUTES INVOLVED.

Since *all* of the pertinent statutes are set out in the record (R. 84-90), we believe that a further printing of them either in the petition for *certiorari* or here is not warranted. The selections made by petitioner (pp. 3-5) omit the very important provisions of section 9358 of the Ohio

Code (R. 89). It seems curious that in making its selection of statutory material, petitioner avoided printing section 9358 upon which respondents laid considerable stress in the lower court. Indeed, it does not advert to this section anywhere in its petition.

STATEMENT—CORRECTIONS.

As stated above the Circuit Court of Appeals not only reversed the decree of the trial court, but remanded the case to the District Court (R. 119) (Petition P. 5).

Petitioner was made a party to respondents' Complaint *not* because it had agreed to reinsure the risks of the American Old Line Life Insurance Company (Petition P. 6), *but* because it had agreed "to discharge all of the * * * liabilities of" the American Old Line (R. 32). As a result of this contract, American Old Line "ceased doing business and distributed all of its * * * assets to the stockholders" (R. 47).

As we shall hereinafter show, the liability of the American Old Line on the bank stock held by it was neither "contingent in incidence" or "uncertain as to amount" (Petition P. 7).

Petitioner fails to point out (Petition P. 9) that it was charged with the duty of complying with Ohio law (R. 114), and that after the approval of the contract by the Ohio Superintendent of Insurance alone, it carried out the contract (R. 78, 79). If this reinsurance agreement is to be stricken down here, it must be stricken down in its entirety and the many policy holders of American Old Line are left without insurance. The view of the Circuit Court of Appeals on this point is found in its opinion (R. 114).

With regard to the conduct, historically (Petition P. 9), of the insurance authorities of Ohio we call attention to the opinion of the Circuit Court of Appeals (R. 115). Even

in the case of the reinsurance of the Omaha Life, the Ohio statute was not "*strictly*" complied with (Petition P. 9). It is to be noted that even in that case the Commission was made up of the Superintendent of Insurance and a representative of the Governor, and a *representative* of the *Attorney General.* The statute provides that only the Governor may appoint a representative to serve in his absence (Sec. 9354—R. 87-88) on the Commission.

The petitioner was *not* entirely "forbidden to acquire bank stock" (Petition P. 9). See Section 9358 (R. 89).

BRIEF.

I.

Bank Stockholders' liability in Illinois is neither "contingent in incidence" nor "uncertain as to amount."

Throughout its petition in this Court, petitioner repeats in a dinning song the phrase "contingent in incidence and uncertain as to amount."

It is significant that nowhere in the petition are these words explained so far as their application to the case at bar is concerned. In spite of this bold and repeated assertion no attempt is made to support it by reference to any Illinois authorities.

The opinion of the Circuit Court of Appeals which is very careful to outline the controversy as presented in the briefs before it, nowhere mentions such a contention. The fact of the matter is the trial court and the Circuit Court of Appeals sitting in Illinois are well acquainted with the nature of bank stockholders' liability under the Illinois Constitution and counsel did not have the effrontery to make any such contention there.

Bank stockholders' superadded liability is imposed by the Constitution of Illinois of 1870 (Act. xi, Sec. 7), which reads as follows:

> "Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors, over and above the amount of stock by him or her held, to an amount equal to his or her respective shares so held, for all its liabilities accruing while he or she remains such stockholder."

This provision is self executing, requiring no legislative provision for its enforcement. The nature of the liability thus imposed is that of limited partners directly to the creditors who were such while the stockholders held their stock. It is not necessary that a bank be insolvent to enforce the liability. If a payment is not made on demand, the stockholder as a limited partner becomes directly liable to the creditor. The creditor's right is direct, not derivative and the liability of the stockholder is the face amount of his stock limited only by the amount due the creditor. Sale of the stock does not terminate the liability and each successive holder is liable for the face amount of the stock. It is usual to recover, in a proceeding by the creditors to enforce the Constitutional liability, several times the capitalization of the bank.

A few of the leading cases outlining the nature and extent of this liability follow:

Golden v. *Cervenka,* 278 Ill. 409.
Sanders v. *Merchants State Bank,* 349 Ill. 547.
Heine v. *Degan,* 362 Ill. 357, 366 *et seq.*
Comstock v. *Morgan Park Bank,* 367 Ill. 276.
Burnet v. *West Madison State Bank,* 375 Ill. 402, 406 *et seq.*

This last case was decided on February 12, 1941.

II.

The claim of respondents is neither "a bit of 'legal grace'" nor one "fortuitously discovered."

On page 14 of the petition, an *ad hominum* argument, unsuccessfully made to the Circuit Court of Appeals is thrown in.

The fact is, petitioner is trying to get out of an obligation which it assumed when it put the American Old Line Life Insurance Company out of business and required its dissolution and the distribution to its stockholders of its assets, putting the assets out of reach of respondents.

It is to be noted that immediately upon the consummation of the reinsurance agreement, the American Old Line Life Insurance Company, went out of business on January 10, 1931 (T. 47), and distributed all of its assets to its stockholders. The dissolution of the American Old Line Life Insurance Company was made in accordance with the provisions of the insurance laws of Illinois then in force. (Smith-Hurds Ill. Rev. Stats. 1929, Chap. 73, Sec. 504.) It is to be noted from this section that in order for the American Old Line Life Insurance Company to so dissolve, affidavit had to be made that all of its liabilities had been met. If appellee had not consummated the reinsurance agreement, agreed to discharge the liability of the American Old Line to appellants, and turned over in cash to American Old Line Life Insurance Company to distribute among its stockholders the sum of $781,720.00 (T. 46), the American Old Line Life Insurance Company would have been in business and in a position to pay its stockholders' liability sought to be enforced in this suit. We fail, therefore, to see how it can be said that appellants are doing anything other than following their just rights

in an effort to enforce the protection given them by the Constitution of the State of Illinois. (Article XI, Sec. 6.)

Of course, appellee's obvious attempt to impress this Court with an *ad hominum* argument has nothing to do with the legal issues presented in this cause, but we thought it well to point out that even this argument is not well founded.

III.

The fact that the re-insurance agreement between the American Old Line Life Insurance Company, and petitioner, was approved by the Superintendent of Insurance of Ohio alone, and not by the Commission provided for by the statute, does not render the re-insurance agreement void, since the said provisions of the Ohio statutes are directory merely, and not mandatory.

We wish to call attention to the fact that this point answers the only contention made by petitioner in its motion for summary judgment in the trial court (R. 58-60).

We believe that the Circuit Court of Appeals has adequately disposed of this contention in its opinion (R. 112-116) with ample citation of Ohio authorities which alone govern this case.

Erie Railroad v. *Tomkins,* 304 U. S. 64.

It clearly appears from the opinion of the Circuit Court of Appeals that contrary to the statement (Petition P. 15) of petitioner, that court based its opinion on and properly interpreted the Ohio statutes and cases.

IV.
Ultra vires.

Questions 1 and 2 argued by petitioner here are encompassed in the consideration by the Circuit Court of Appeals of the question of whether or not the assumption by the petitioner of the liability of American Old Line on the bank stock was *ultra vires* (R. 116-118).

The question of the effect of the non-compliance strictly with the statutory provisions of the Ohio Code referred to in the preceding point is encompassed within the large problem of *ultra vires* in corporate transactions. The case was so treated by the appellee in the trial court and by the Circuit Court of Appeals and will be discussed here. It will be noted from an examination of the re-insurance agreement in question in the case at bar (R. 32) that the appellee took over the entire business of the American Old Line Life Insurance Company, took over all of its policies, assumed all of its liabilities and paid to the Old Line Life Insurance Company a substantial sum of money.

While the appellee does not assert in its motion for summary judgment (R. 58-60) that if this re-insurance agreement had been approved by the Commission in Ohio, in strict accordance with the Statute, it would not be enforceable, it may be argued that the broad problem of *nltra vires* is presented. Certainly re-insurance agreements are permitted by the statutes and in connection therewith there is no contention made, but that the appellee could pay a substantial sum of money in connection with the taking over of contracts of insurance. It seems to follow logically that if part of the consideration for the assignment of the insurance policies is the payment of liabilities rather than the payment of cash, there can be no contention that this was beyond the powers of the

Ohio Corporation. The statutes (Sec. 9351, R. 87) recognize that insurance companies may enter into re-insurance agreements and if the assumption of the liabilities of the American Old Line Life Insurance Company was undertaken rather than the payment of cash, can it be said that the exercise of this incidental power was not encompassed in the power to enter into such contracts? We respectfully call attention to the discussion of this point by the Circuit Court of Appeals (R. 117).

The most that can be said here is that the contract of re-insurance was not *ultra vires* the appellee, but that the method of its approval was not entirely in accordance with the manner prescribed by statute.

Careful authorities have pointed out that where a corporation has power to undertake a certain course of conduct, the failure to comply with conditions or formalities does not involve a question of *ultra vires.*

Fletcher Enc. Corporations, Perm. Ed., Vol. 7, Sec. 3402.

A discussion of *ultra vires* when asserted in a law suit always leads to a great deal of confusion. As so often occurs, introduction of a foreign word into American or English law is simply a cover for confused thinking.

Fortunately, we are confronted with an Ohio statute and our only concern is to ascertain the extent of the doctrine of *ultra vires* in that State.

In years gone by, a consideration of this case in this court would have required a discussion of the theories of *ultra vires* entertained by the Federal courts which, authorities agree, are distinct from the rules applied in most States.

Fletcher Ency. Corporations, Perm. Ed., Vol. 7, Sec. 3468 and following.

Ohio Jurisprudence, Vol. 10, p. 843, Sec. 622.

Since the case of *Erie Railroad* v. *Tompkins* (1937), 304 U. S. 64, 82 L. Ed. 1188, our interest is solely in the meaning of the Ohio statutes as interpreted by the Ohio courts.

As in most states today, Ohio has now abolished the defense of *ultra vires.*

Ohio Jurisprudence, Vol. 10, p. 827, Sec. 614.

Even before the adoption of the Ohio statute, abolishing the defense of *ultra vires,* however, the courts in the State of Ohio had arrived at substantially that result.

Ohio Jurisprudence, Vol. 10, p. 828, Sec. 615 and following.

The law in Ohio with regard to *ultra vires* is well summarized in *Ohio Jurisprudence,* Vol. 10, pp. 830-31, Sec. 615.

The latest expression on the subject of *ultra vires* in the courts of Ohio is found in the case of *London & Lancashire Indemnity Co.* v. *Fairbanks Steam Shovel Co.,* 112 Oh. St. 136, 147 N. E. 329 (1925). In that case the defendant company claimed that it was *ultra vires* for it to have executed a contract of indemnity to the plaintiff. The court rejected this plea, saying (p. 145):

> "Moreover, the defendant cannot here raise the question of *ultra vires,* for the contract has been fully performed by the indemnity company. The contract was performed by that company when it executed the bonds. Generally speaking, the rule of *ultra vires* is enforced in its drastic features only where contracts made by private corporations are wholly executory upon both sides. But where the *ultra vires* transaction is executed on one side, a private corporation is estopped from claiming that a transaction was *ultra vires* to the extent it has been performed by the other party. *Day* v. *Spiral Springs Buggy Co.* 57 Mich. 146, 23 N. W. 628, 58 Am. Rep. 352; 14 A Corpus Juris, p. 318.

"This rule is based upon the consideration that, as between private corporations, one party cannot receive the benefits which are embraced in total performance of a contract made with it by another party and then set up the invalidity of the transaction as a defense. *Arkansas Valley Town & Land Co.* v. *Lincoln,* 56 Kan. 145, 32 P., 706; *Western & Southern Fire Ins. Co.* v. *Murphy,* 56 Okla., 702, 156 P. 885; *Manchester & Lawrence Rd.* v. *Concord Ry.,* 66 N. H. 100, 20 A. 383, 9 L. R. A. 689, 49 Am. St. Rep. 582; *Kelly* v. *Central Union Fire Ins. Co.,* 101 Kan. 91, 165 P. 806, L. R. A. 1918 C, 1170; *Eckman* v. *C. B. & Q. Rd.,* 169 Ill. 312, 48 N. E. 496, 38 L. R. A. 750."

The case of *Western & Southern Fire Ins. Co.* v. *Murphy* (1916), 56 Okla. 702, 156 Pac. 885, cited by the Ohio Court, involved a plea of *ultra vires* by an insurance company. In this case Murphy was President of the insurance company. He entered into a contract providing for his resignation and the purchase from him of his stock in the insurance company. Upon his suit to enforce the contract the insurance company pleaded *ultra vires,* but the court sustained Murphy's action on the contract on the ground that Murphy, having fully performed, the insurance company could not be heard to deny the validity of its undertaking.

Likewise the case of *Kelly* v. *Central Union Fire Insurance Company* (1917), 101 Kans. 91, 165 Pac. 806, cited by the Ohio court, involved a plea of *ultra vires* by an insurance company. The insurance company had agreed to repurchase the stock of Kelly in order to reduce an oversubscription to its stock. The stock was of the par value of $10; the price paid by Kelly was $12.50 a share and the agreement to repurchase was for $15 per share. The insurance company claimed its contract was *ultra vires* but the court enforced the contract. See p. 809.

Other earlier cases expounding the Ohio doctrine of *ultra vires* are:

Hays v. *Galion Gas Light & Coal Co.* (1876), 29 Oh. St. 330, 340.

Larwell v. *Hanover Savings Deposit Society* (1883), 40 Oh. St. 274, 283, 284.

It thus appears that even aside from statutes the courts of Ohio have placed that State squarely on the proposition that a corporation, which has received the benefit of its contract, cannot take advantage of its alleged *ultra vires* act to the detriment of those with whom it has contracted or those claiming through the person with whom it has contracted.

We have been unable to find any cases specifically interpreting the Ohio insurance statutes and in the absence of a holding by the courts of Ohio that the insurance statute have changed their uniform holding with regard to the plea of *ultra vires* we submit that it must be concluded that the plea of *ultra vires* in this case is not well founded. The Appellee has received and still retains all the benefits of the re-insurance agreement.

Petitioner makes the contention that an Ohio Insurance Company could not invest in bank stocks. This may very well be conceded in a situation where the corporation might have made an original investment in such stock. It seems, however, that in connection with its re-insurance agreement the appellee could even have become the owner of this stock. (See Section 9358 (T. 89).)

In any event appellants do not base their claim upon a contention that appellee was ever the owner of this bank stock. The fact of the matter was that the American Old Line Life Insurance Company had certain assets and certain liabilities. Among the latter, was a liability on the bank stock held by it. Apparently the assets of the Amer-

ican Old Line exceeded the liabilities and on a presumably favorable basis appellee agreed to take over the assets, assume the liabilities and pay the American Old Line for its stockholders a substantial sum of money (R. 32-34—especially paragraph 11), and the appellee did pay over the sum of $781,720.00 (R. 46). Appellee apparently reduced its payment to the American Old Line by the sum of $139,800.00, because of the liability of the American Old Line on account of its bank stockholdings. The appellee apparently could have paid the additional $139,800.00 and been relieved of this liability, but in that event the American Old Line could not have gone out of business until its bank stock liability had been fully discharged.

Smith-Hurd Ill. Rev. Stats. 1929, Chap. 73, Section 504.

Since this is a matter clearly governed by Ohio law, we will not burden the court by discussing cases cited by petitioner from other jurisdictions. We will confine our comment to the Ohio cases cited.

The case of *Ulmer* v. *Fulton,* 129 Oh. St. 323, involved an insolvent trust and savings bank and concerned trustee's duties. Incidentally comment was made upon the rule of *ultra vires* as applied to national banks. Just as now the Federal Court give due deference to State Authorities on questions of state law, so Ohio gives due deference to the Federal rules of *ultra vires* in connection with national bank.

So the case of *Gress* v. *Fort Laramie,* 100 Oh. St. 35, involved a national bank and Ohio courts applied the federal rules of *ultra vires.*

The case of *Norwood Sash & Door Mfg. Co.* v. *Logsdon,* 65 Oh. App. 254, involved a bank and the court held that banks could plead *ultra vires* where other corporations could not.

The case of *Gardner* v. *Johns,* 64 Ohio App. 229, involved a Building and Loan Association. The association had taken a deed to a piece of property on which it had a first mortgage. In the deed it assumed taxes and "liens." There was apparently a failure to realize that a second mortgage was present. The Association pleaded *"ultra vires,"* but the decision went on the fact that the second mortgagee had given up nothing and the Association had received nothing but, indeed, had lost the property.

In *Hackett* v. *Kupke,* 62 Oh. App. 89, it was held that one who purchased bonds from a bank on a repurchase agreement *could* recover on *quantum meruit.* This case is exactly contra to *Awotin* v. *Atlas Exchange Bank,* 295 U. S. 209, applied to national banks.

It seems to us that the Circuit Court of Appeals has correctly applied Ohio law in a matter of strictly Ohio concern. There is no support in authority and no reason to put insurance companies in the same class as banks.

CONCLUSION.

We agree with petitioner that this matter is governed strictly by Ohio law. We have consistently urged this point in arguments and briefs in the lower court. We submit that there *can* be no applicable decision of this Court with which the decision of the Circuit Court of Appeals can be in conflict. The Circuit Court of Appeals properly interpreted the applicable law of Ohio.

We submit that the petition for *certiorari* should be denied.

Respectfully submitted,

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